Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Ohio's investment tax credit, Ohio Revised Code § 5733.33, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that DaimlerChrysler Corporation is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which in turn is a wholly owned subsidiary of DaimlerChrysler A.G.

The parties to the proceeding in the court of appeals were plaintiffs Charlotte I. Cuno, Duane M. Arquette, Robert Scott Brundage, Julie Coyle, Helen Czapczynski, Mary Ebright, Carrie Hawkins, Kathleen Hawkins, Hutton Pharmacy, Inc., Jean E. Kaczmarek, Kim's Auto and Truck Servive, Inc., Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Carol A. Raschke, Herbert H. Raschke, Rick Van Landingham, and defendants DaimlerChrysler Corporation, the Toledo Public School District, the Washington Local School District, the City of Toledo, the State of Ohio, the Ohio State Treasurer, the Ohio Department of Taxation, and the Ohio Department of Development.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler Corporation ("DaimlerChrysler") respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 386 F.3d 738. The order of the court of appeals denying rehearing (App., *infra*, 31a) is unreported. The opinion of the district court (App., *infra*, 18a-30a) is reported at 154 F. Supp. 2d 1196.

JURISDICTION

The court of appeals' judgment was entered on October 19, 2004. A timely petition for rehearing was denied on January 18, 2005. On April 7, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in relevant part:

> The Congress Shall have the Power * * * To Regulate commerce * * * among the several States.

Ohio Revised Code § 5733.33 is reproduced in the appendix to this petition at 32a-43a.

STATEMENT

In this case, the Sixth Circuit held that the State of Ohio violates the Commerce Clause by offering business income tax incentives to encourage economic development in the

State. This holding is one of enormous practical and doctrinal importance: it calls into question the constitutionality of hundreds of similar tax programs offered by a substantial majority of the states. The uncertainty caused by the Sixth Circuit's decision accordingly has thrown into disarray the job creation efforts and economic planning of states and localities across the Nation, while disrupting the investment decisions of thousands of businesses. Because that holding also cannot be reconciled with a decision of the highest court of a state in the Sixth Circuit, rests on a novel legal theory that departs from principles announced by this Court, and finds no support in the policies of the Commerce Clause, further review is warranted. Given the significance of the issue presented here, it plainly should be this Court, and not the Sixth Circuit, that provides guidance to states and taxpayers across the country on the permissible use of business tax incentives.

1. Ohio's Income Tax Credit

"Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) (footnotes omitted). Such "[l]ocation[al] incentives have become an ubiquitous feature of the state tax scene." Peter Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 384 (1996). And of the myriad state and local provisions that are intended to attract and encourage business development, "[t]he most common form of state tax incentive in this country is the income tax credit." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 817.

This case involves a constitutional challenge to such a provision, Ohio's investment tax credit (or "ITC"), which is typical of business development income tax incentives offered by states across the country.[1] Ohio's ITC provides that a taxpayer may receive a "nonrefundable credit * * * against the tax imposed by section 5733.06 of the Revised Code" (Ohio's corporate franchise tax, which is based on corporate income or net worth) if the taxpayer "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by December 31, 2006. Ohio Rev. Code ("O.R.C.") § 5733.33(B)(1). This investment tax credit of seven and one-half percent is available in an amount equal to "the cost of the new manufacturing equipment purchased during the calendar year for use in a county" over and above the average annual cost of new manufacturing machinery and equipment purchased by the taxpayer for use in that county during three specified prior years.[2] The credit amount increases to 13½ percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant closing or downsizing by

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[1] Ohio law also provides that a municipal corporation may offer a property tax exemption to an enterprise that develops facilities or preserves employment in a distressed area. O.R.C. § 5709.62. Pursuant to this provision, DaimlerChrysler received a ten-year, 100% exemption from taxes on certain personal property first used in connection with its plant in Toledo. See App., *infra*, 2a. Although plaintiffs challenged the constitutionality of the property tax exemption, the district court and the Sixth Circuit both upheld that provision. *Id.* at 11a-14a. Plaintiffs have sought review of that aspect of the decision below in a petition now pending before the Court, No. 04-1407, *Cuno* v. *DaimlerChrysler, Inc.* DaimlerChrysler is responding to that petition in a separate brief.

[2] For credits claimed in 1999 and thereafter, the baseline period is the years six, five, and four years before the year for which the credit is claimed. Thus, for example, to determine whether an investment in 2000 is eligible for any credit, one would compare the amount invested in 2000 with the average amount invested by the taxpayer in that same county in 1994, 1995, and 1996.

local employers. *Id.*, §§ 5733.33(C)(2), (A)(8)-(16). The credit may not exceed $1,000,000 unless, in the year for which it is claimed, the taxpayer has increased its overall ownership of manufacturing equipment in the State. *Id.*, § 5733.33(B)(2)(a).

The ITC has been a significant tool used by Ohio to encourage in-state investment. In its petition seeking rehearing before the Sixth Circuit, Ohio represented that, since the credit's inception in 1995, corporations have relied upon the provision in investing more than $30 billion in Ohio plants and equipment. No. 01-3960, *Cuno* v. *DaimlerChrysler Corp.* (6th Cir.), Ohio's Pet. For Reh'g, at 4. In 2002 alone, more than 2,100 corporate taxpayers took Ohio ITC credits totaling more than $73 million. *Ibid.*

2. *Background Of The Litigation*

On November 12, 1998, petitioner DaimlerChrysler entered into an agreement with the City of Toledo, Ohio, to construct a new vehicle assembly plant near the company's existing facility in the City. App., *infra*, 2a. DaimlerChrysler estimated that it would invest approximately $1.2 billion in the new plant and that, as a result of the investment, the project would provide jobs for thousands of workers. *Ibid.* As an incentive for DaimlerChrysler to undertake the project, which is located within an economically distressed area, the City and the affected local school districts agreed that the company would obtain the tax exemptions that are available under state law. Pursuant to O.R.C. § 5733.33, DaimlerChrysler accordingly has received the investment tax credit of 13½ percent for investments related to the project through December 31, 2000.

Invoking the Constitution's Commerce Clause, the plaintiffs (respondents in this Court), most of whom are local Ohio taxpayers, then brought this action in Ohio state court against DaimlerChrysler, the State of Ohio, and the City of Toledo. Plaintiffs sought to invalidate both the tax credit

granted to DaimlerChrysler and the Ohio statute making the credit available. The defendants removed the case to the U.S. District Court for the Northern District of Ohio, which rejected plaintiffs' claims on the merits and ordered the complaint dismissed. App., *infra*, 18a-30a. After canvassing the relevant case law, the court concluded that the "investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce," and that the credit also does not punish activity carried on outside Ohio. *Id.* at 28a. The court accordingly held that the tax credit does "not 'discriminate against interstate commerce,'" concluding that it could not find the credit unconstitutional without "violating the clear mandate of Supreme Court precedent." *Id.* at 29a.[3]

3. *The Decision Below*

The Sixth Circuit reversed in relevant part, holding the investment tax credit unconstitutional. App, *infra*, 1a-17a. The court began by recognizing that "it is legitimate for Ohio to structure its tax system to encourage new interstate economic activity" and that the Commerce Clause does not "prevent a state from 'compet[ing] with other States for a share of interstate commerce.'" *Id.* at 4a-5a (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-337 (1977)). The court also acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 6a. And noting the defendants' argument that "tax incentives, like the Ohio tax credit, are permissible so long as they do not penalize out-of-state economic activity," the court of appeals agreed that "it is arguably possible to fit certain of the Supreme Court's cases into this framework." *Id.* at 9a. The court added that the Supreme

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[3] In addition, the district court rejected claims challenging the ITC and the property tax exemption under the equal protection clause of the Ohio Constitution. The court of appeals affirmed that holding. See App., *infra*, 14a-17a.

Court "has never precisely delineated the scope of the doctrine that bars discriminatory taxes." *Id.* at 5a.

Having said all that, however, the court of appeals nevertheless went on to hold that Ohio's investment tax credit violates the Commerce Clause. In doing so, the court appeared to accept plaintiffs' argument that the credit is invalid because its "economic effect * * * is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states." App., *infra*, 9a. To reach this conclusion, the court found no meaningful distinction "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.* at 9a, 10a. At the same time, the court rejected defendants' argument that the investment tax credit should be likened to a "direct subsidy," even though a subsidy and the credit "would no doubt have the same economic effect." *Id.* at 10a. Accordingly, although the court declared itself "sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas" (*id.* at 11a), it reversed "that portion of the district court's judgment upholding as constitutional the investment tax credit provision." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision in this case involves a question of exceptional importance. Invoking the Commerce Clause, the court of appeals invalidated a crucial tool used by Ohio to retain employment and further economic development. And the decision below has an impact that far transcends Ohio's borders, calling into question the constitutionality of very similar economic development laws that are in force in states across the Nation – thus disrupting ongoing efforts to foster investment and job creation.

That decision should not stand. It is inconsistent with the settled understanding that the Commerce Clause's anti-

discrimination principle was designed to invalidate *protectionist* state legislation that provides a competitive advantage to in-state businesses, and has no role to play when – as is true in this case – the sole purpose of a challenged state law is to reward intrastate investment. As this Court has explained repeatedly, nothing in the Constitution prevents a state from "compet[ing] with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336-337. That is precisely what Ohio is doing here. Indeed, the Sixth Circuit's ruling directly conflicts with the Michigan Supreme Court's decision upholding a Michigan tax abatement statute that was designed to encourage local investment in that State. Because the decision below has thrown into confusion both the business incentive programs of dozens of states and fundamental Commerce Clause doctrine, review of that decision by this Court plainly is in order.

A. The Decision Below Involves A Recurring Issue Of Great Practical Importance

1. The Sixth Circuit's Decision Has Disrupted State Income Tax Abatement Programs Nationwide

At the outset, the extraordinary importance of this case to the national economy and to economic development in states across the Nation makes review of the Sixth Circuit's decision imperative. There is no denying that the court of appeals' holding "sent shock waves throughout the state and local tax community" and that, "[g]iven the widespread use of similar legislation[,] the potential ramifications [of the decision] nationwide are staggering." Timothy Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. TAX'N 359, 359 (2004). As we explain below, the Sixth Circuit's holding is inconsistent with the approach taken by this and other courts. But even if that were not the case, the far-reaching implica-

tions of the decision would warrant immediate review by this Court. Indeed, "[i]n light of the importance of the issues raised by this case," plaintiffs have represented that they "do not intend to oppose [the] petitions for review of the constitutionality of Ohio's tax credit." No. 04-1407, *Cuno* v. *DaimlerChrysler, Inc.*, Pet. For Cert., at 7.[4]

As has been widely noted, the rule announced by the Sixth Circuit has implications for the validity of literally hundreds of statutes in dozens of states. Virtually all states provide tax and similar economic incentives for local economic activity. See, *e.g.*, Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997); 1 MULTISTATE CORPORATE INCOME TAX GUIDE (CCH Internet) ¶ 180 (2001). And income tax benefits of the sort invalidated by the Sixth Circuit are "the most common form of tax incentive." Hellerstein & Conen, *supra*, 81 CORNELL L. REV. at 797. See Enrich, *supra*, 110 HARV. L. REV. at 384.[5] Tax abatement provisions thus "constitute long-standing, familiar, and central features of every state's taxing system." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 805. The importance of this economic development tool to the states is apparent from the frequency with which it is applied: the aggregate amount of business location tax incentives as of 1996 approached $50 billion (see Kenneth P. Thomas, COMPETING

[4] That petition should be captioned "*Cuno* v. *DaimlerChrysler Corporation.*"

[5] One study found more than 330 statutory income or franchise tax credits and incentives offered by 46 states. See Gillis, *supra*, 101 J. TAX'N at 360 (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)). Another state-by-state survey "found that, of forty-eight states responding, only Wyoming had not enacted at least one location incentive between 1991 and 1993." Enrich, *supra*, 110 HARV. L. REV. at 383-384.

FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL ERA 159-160 (2000)), and doubtless is vastly higher today.

Yet the Sixth Circuit's decision calls into question the constitutionality of all state income tax and related business incentives, most of which are unlikely to be distinguishable from Ohio's in any material respect. See Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 802 ("Almost no state income tax incentive – and there are hundreds of them across the country – meets the * * * requirement of strict geographic neutrality."). As a consequence, "virtually every state in the union has some form of tax credit or incentive that may now be under a constitutional cloud. Moreover, businesses across the country, which have relied on these incentives in making in-state investment decisions, have billions of dollars at stake in the resolution of the controversy." Gillis, *supra*, 101 J. TAX'N at 359.

The result is that the Sixth Circuit's decision is having an immediate impact on state and local governments, businesses, and workers in almost every state. "The decision leaves many states (40 or more), and potentially thousands of businesses, under a cloud of uncertainty about the viability of existing tax incentive arrangements involving billions in capital investment." John Biggins, *Investment Tax Credit Incentive Violates Commerce Clause, Says Sixth Circuit*, 14 J. MULTISTATE TAX'N & INCENTIVES 36, 36 (2004). And this effect is being felt nationwide because the decision below creates doubts about the validity of laws in states *outside* the Sixth Circuit. See Gillis, *supra*, 101 J. TAX'N at 362 ("For taxpayers in other states, both those within and outside the jurisdiction of the Sixth Circuit, the availability of similar incentives is under a pall."). Immediate review by this Court – of a decision that is causing widespread "unpredictability and instability," and thus disrupting economic development efforts across the Nation (Biggins, *supra*, 14 J. MULTISTATE TAX'N & INCENTIVES at 38) – accordingly is warranted.

2. *The Decision Below Has Handicapped Economic Development Efforts In The Sixth Circuit*

Moreover, review would be in order even if the Court considers only the effects of the decision below on states in the Sixth Circuit. The court of appeals' decision invalidated a statute that is a principal tool used by Ohio and its local governments to maintain employment and encourage economic development. As we have noted, the ITC has been invoked to attract billions of dollars in investment and to retain many thousands of jobs in Ohio over the past decade. Yet the decision below calls an abrupt halt to use of this tool to bolster the State's economy and workforce.

At the same time, the court of appeals' holding places in grave doubt the constitutionality of economic development programs used by all of the other states in the Sixth Circuit.[6] Those laws are now under a cloud – which means that, if states in other circuits disregard the uncertainty created by the Sixth Circuit's holding and continue to provide location tax incentives (and if businesses, improbably, disregard that uncertainty and rely on those incentives), Ohio, Kentucky,

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[6] Among other things, Kentucky grants companies that invest in economic development projects within qualified zones a 100% credit against the state income taxes that would otherwise be attributable to those projects. Ky. Rev. Stat. Ann. §§ 141.400, 154.45-010, 154.23-035. Michigan also grants tax credits to companies that make new investments within designated enterprise zones. Mich. Comp. Laws § 208.37(a). And Tennessee offers businesses a 1% excise tax credit for investments in industrial machinery within the State (Tenn. Code Ann. § 67-4-2009(4)(A)), as well as credits of $2,000 to $5,000 against franchise or excise tax liability for each net new full-time employee hired in Tennessee. Tenn. Code Ann. § 67-2-2109(B)(2). In an amicus brief filed in support of rehearing in the Sixth Circuit, these States represented that their various incentive programs overall had generated some $39 billion in investment from 1995 through 2002.

Michigan, and Tennessee will be disadvantaged in seeking to attract jobs and economic development that could be located elsewhere. This is a significant handicap to impose on States that rely on manufacturing and industry as a mainstay of their economies.

3. *The Sixth Circuit's Ruling Conflicts With A Decision Of The Michigan Supreme Court*

The uncertainty created by the decision below is especially acute because the Michigan Supreme Court, in *Caterpillar, Inc.* v. *Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), *upheld* a state tax incentive that in relevant respects was quite similar to Ohio's ITC. The Michigan provision provided a capital acquisition deduction (the "CAD") from the State's Single Business Tax (a value-added type tax on business activity) for the acquisition of capital assets – but "only capital acquisitions related to Michigan business activity" benefited from the deduction. *Id.* at 186. See generally *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 385 (1991) (upholding the Single Business Tax against Commerce Clause challenge).

In particular, the CAD provided a deduction for the cost of acquiring real property, but only if "'the assets are physically located in Michigan.'" *Caterpillar*, 488 N.W.2d at 187 (citation omitted). Under this provision, "two otherwise similarly situated companies that invest in real property of equal value during the tax year will receive either a substantial deduction or no deduction at all, depending on whether that property is located in state or out of state." *Id.* at 203 (Cavanaugh, C.J., dissenting).[7] Michigan's CAD thus provided a

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[7] In addition, the CAD offered a deduction measured by the value of tangible personal property acquired by the taxpayer during the tax year. Although this deduction ostensibly was available no matter where the new tangible assets were located, it was calculated by multiplying the value of the newly acquired personal property by the average of two ratios: the ratio of the taxpayer's Michigan pay-

tax benefit for in-state business investment, while denying an equivalent benefit for equivalent business investment made out-of-state – just as does Ohio's ITC. Yet the Michigan Supreme Court had no difficulty finding the CAD constitutional under the Commerce Clause, explaining that the provision should not be regarded as discriminatory on its face because it "is available for any taxpayer" (*id.* at 192 (majority opinion)) and noting that the deduction did not have an impermissible purpose because the U.S. Supreme Court has "held that the promotion and development and investment of business in Michigan does not violate the Commerce Clause." *Ibid.* The court added that "a discriminatory effect does not result from fair encouragement of in-state business like that provided by [the CAD]." *Id.* at 193.

This conflict between the Michigan Supreme Court and the Sixth Circuit – the Circuit in which Michigan is located – will leave the law in a state of intolerable confusion if the court of appeals' decision stands. It creates unresolvable uncertainty about the constitutionality of tax incentives offered by states in the Circuit and invites forum shopping when such incentives are challenged. This consideration, too, warrants immediate review of the case by this Court.

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roll to its total payroll, and the ratio of the taxpayer's Michigan property to its total property. 488 N.W.2d at 186-187 (majority opinion). As a consequence of this formula, which makes the deduction more valuable as more of a taxpayer's property is located in-state, the inevitable effect of the personal property CAD was "that a greater deduction, resulting in a lower effective tax rate on the Michigan-apportioned tax base, is afforded * * * to * * * a company investing the new personal property in state, as opposed to a company investing the new personal property out of state." *Id.* at 202 (Cavanaugh, C.J., dissenting).

B. The Decision Below Departs From Principles Announced By This Court And Will Confuse Commerce Clause Doctrine

The need for review is particularly compelling because the Sixth Circuit's decision marks an extraordinary departure from any common-sense understanding of the Commerce Clause. Adopting what the plaintiffs themselves described below as a "novel legal theory" (No. 01-3960, *Cuno* v. *DaimlerChrysler Corp.* (6th Cir.), Pl. Br., at viii), the court of appeals struck down a law that was *not* designed to disadvantage interstate commerce, does *not* provide a meaningful competitive benefit to Ohio businesses vis-à-vis out-of-state competitors, does *not* disturb the flow of commerce across Ohio's borders – and *does* encourage the movement of business across state lines. In doing so, the court did not describe any articulable Commerce Clause policy that was advanced by its holding. Because that decision contributes to significant uncertainty about the scope of the Commerce Clause, intervention by this Court is called for.

1. There Is Uncertainty About The Application Of Commerce Clause Principles To Economic Development Tax Incentives

The outcome in the Sixth Circuit may be attributable to a degree of confusion in the law of the Commerce Clause as it relates to state economic development efforts. This Court has recognized that its analysis in this area "has left much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 403 (1984) (citations and internal quotation marks omitted). Commentators have agreed that there is "a palpable tension in the Supreme Court's decisions," marked by an "ill-defined distinction between the constitutional carrot and the unconstitutional stick in state tax, subsidy, and related cases." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 791-

792. See, *e.g.*, Clayton Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 493 (1997) ("One point on which commentators agree is that our Commerce Clause jurisprudence is confused."). Indeed, "the Court has not had occasion to address a challenge grounded in the claim that a state tax provision's primary purpose or effect is to attract business to locate or expand in the state." Enrich, *supra*, 110 HARV. L. REV. at 381. In the absence of such clear guidance, respected commentators have divided on the constitutionality of provisions like the ITC. Compare Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 929-937 (1986) (such provisions are constitutional); Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) (same); Gillette, *supra*, 82 MINN. L. REV. at 449 ("Locational incentives directed at business would appear, on their face, to serve the[] objectives of interstate competition."), with Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 817-825 (such provisions unconstitutional); Enrich, *supra*, 110 HARV. L. REV. 377 (same).

This disagreement perhaps is not surprising, because the question in cases like this one lies at the intersection of two competing Commerce Clause principles that point in very different directions. On the one hand, it is settled that the Clause precludes states from discriminating against out-of-state or interstate businesses, thus "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (citations and internal quotation marks omitted).[8] On the other hand, however, the

[8] Under the test applied by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), a state tax satisfies the requirements of the Commerce Clause if (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the State. See also, *e.g.*, *Jefferson Lines*, 514 U.S. at 183. Plaintiffs do not deny that Ohio's ITC satisfies the first, second, and fourth prongs of this test. See App., *infra*, 4a.

Court has emphasized that "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imps., Ltd.* v. *Dias*, 468 U.S. 263, 272 (1984). As we explain below, we believe that the Sixth Circuit erred in where it struck the balance between these principles. But even if we are wrong in that submission, given the great uncertainty and confusion in the law – a confusion that has been significantly compounded by the Sixth Circuit's decision – guidance from this Court is urgently needed.

2. *The Commerce Clause Proscribes Protectionist State Laws*

Because the Commerce Clause's fundamental purpose was "'to keep commercial intercourse among the States free from all invidious and partial restraints'" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons* v. *Ogden*, 9 Wheat. 1, 231 (1824) (Johnson, J., concurring in the judgment)), the Clause has been understood to proscribe state laws that "discriminate[] against or unduly burden[] interstate commerce and thereby 'imped[e] free private trade in the national marketplace.'" *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc.* v. *State*, 447 U.S. 429, 437 (1980)). As the Court has explained, this anti-discrimination principle means that "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-

state competitors." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 330 (1996) (internal quotation marks and citations omitted). See, *e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 577-578; *Jefferson Lines*, 514 U.S. at 197 (1995); *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1879).

In light of this purpose underlying the Clause, the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 (1994). See Gerald Gunther & Kathleen Sullivan, CONSTITUTIONAL LAW 141 (13th ed. 1997) ("the national commerce power, it was hoped, would afford the means to end hostile state restrictions, retaliatory trade regulations, and protective tariffs on imports from other states"). While the Court has applied the Clause to many variations on that paradigm – for example, to laws that tax "'a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State'" (*Fulton Corp.*, 516 U.S. at 331 (quoting *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992)), or that "discourage domestic corporations from plying their trades in interstate commerce" (*id.* at 333) – it has long been settled that the Clause is fundamentally directed at the use of state authority "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). See, *e.g.*, *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 (1978).

When state laws do not run afoul of this requirement – that is, when they do not impose a protectionist regime or penalize those who engage in interstate trade – nothing in the

Commerce Clause's antidiscrimination principle prevents the use of state tax statutes to provide incentives for in-state economic activity. Even while invalidating protectionist state laws, the Court has emphasized repeatedly that it did not mean to

> prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy.

Boston Stock Exch., 429 U.S. at 336-337. The Court thus has stressed that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988). To the contrary, "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imps.*, 468 U.S. at 271. See also, *e.g.*, *Trinova Corp.*, 498 U.S. at 385 (it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State").

In light of this principle, the Court has indicated that, for example, a state subsidy provided only to in-state companies "ordinarily imposes no burden on interstate commerce, but merely assists local business," even though such a regime obviously distinguishes between domestic and foreign enterprises. *West Lynn Creamery*, 512 U.S. at 199. See *id.* at 199 n.15; *New Energy*, 486 U.S. at 278 ("[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition"); Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 792 ("discriminatory subsidies * * * are almost always constitutional"); Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L. J. 965 (1998) (same). And several Justices have declared that

tax incentives may be equally permissible: the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring). See *Chemical Waste Mgmt.*, 504 U.S. at 351 (Rehnquist, C.J., dissenting) ("[t]here seems to be nothing * * * that would prevent [a State] from providing subsidies or other tax breaks to domestic industries").

3. The Decision Below Finds No Support In This Court's Holdings

Against this background, the Sixth Circuit was wrong in its simplistic view that a state violates the Commerce Clause whenever its tax programs "further investment in-state at the expense of development in other states." App., *infra*, 9a. Indeed, the court of appeals' rule, if meant to be taken literally, cannot be correct. For example, it is universally agreed that states may cut their general tax rates to lure business from neighboring jurisdictions. See *West Lynn Creamery*, 512 U.S. at 199 n.15. Yet State A surely "furthers investment in-state at the expense of development in other states" in a very dramatic way when it lowers its corporate tax rates below those imposed by State B, both by making State A more attractive to business than State B and by giving corporate taxpayers in State A a competitive advantage over businesses that pay State B's higher rates. See generally *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, 1387 (8th Cir. 1997) (noting that companies may avoid states with "comparatively high state taxes"). The Sixth Circuit's rule

accordingly cannot provide a sound basis for decision under the Commerce Clause.[9]

Nor does the holding below find support in the three decisions of this Court that were cited by the Sixth Circuit. See App., *infra*, 6a-9a (citing *Boston Stock Exchange*, *Maryland* v. *Lousiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp.*). Those decisions certainly do not hold that it is impermissible for states to "further investment in-state at the expense of development in other states." And Ohio's ITC does not burden out-of-state transactions, activities, or actors, as was true of the laws challenged in each of the decisions relied upon by the court of appeals. Those laws "were really tariffs on interstate sales, manufacturing, or services," which involved straightforward attempts to benefit in-state firms at the expense of out-of-state competitors or to penalize the conduct of business in other states. Firestone, *supra*, 36 STATE TAX NOTES at 190. Ohio's ITC has no such effect.

In *Boston Stock Exchange*, the Court disapproved of a New York statute that, to protect the New York stock exchanges from out-of-state competitors, imposed a lower transfer tax on securities transactions completed through New York brokers than on identical transactions using out-of-state brokers. 429 U.S. at 324-325. Striking down the dif-

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[9] To reach its expansive holding, the court of appeals rejected what it characterized as the defendants' "view" that "the Commerce Clause is primarily concerned with preventing economic protectionism – that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce." App., *infra*, 9a. But as we have noted, that view is not something invented by the defendants in this case; using almost identical language, *this Court* has explained that "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp.*, 516 U.S. at 330 (internal quotation marks and citations omitted).

ferential tax rate, the Court held "only that * * * no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 336-337.

Similarly, in *Maryland* v. *Lousiana*, Louisiana imposed a tax on the "first use" of natural gas imported into the State that was identical in amount to the severance tax imposed on Louisiana gas producers. 451 U.S. at 731-733. But "exemptions and credits for the First-Use Tax" gave taxpayers subject to the levy a credit on any severance tax owed to Louisiana, while purchasers of gas used for consumption in the State were provided credits against other Louisiana taxes. *Id.* at 732-733. The result was that "Louisiana consumers of [out-of-state] gas for the most part [were] not burdened by the [First-Use] Tax." *Id.* at 733. The Court held that this regime "unquestionably discriminates against interstate commerce in favor of local interests" because "[c]ompetitive users in other States are burdened with the Tax" (*id.* at 756) while "Louisiana consumers of [out-of-state] gas are * * * substantially protected against the impact of the First-Use Tax." *Id.* at 757.

Finally, in *Westinghouse Electric Corp.*, the Court invalidated a New York law that taxed corporate income derived from subsidiaries engaged exclusively in export activity, but then awarded the parent company a partially offsetting tax credit that was dependent on the proportion of its total shipping activities that the subsidiary conducted in New York; the credit increased as the subsidiary "move[d] a greater percentage of its shipping activities into the State of New York" (466 U.S. at 400), and decreased as the firm increased its shipping activities in other states. As a result, the scheme "not only * * * 'provide[d] a positive incentive for increased business activity in New York State,'" "but also * * * penalize[d] increases in the [taxpayer's] shipping activities in other States." *Id.* at 400-401. The Court regarded this latter element as "the most pernicious effect of the credit scheme" because it "lower[ed] the incentive [the tax law] award[ed] for in-

state * * * activity as the [taxpayer] increase[d] its out-of-state activity" (*id.* at 401 n.9), and therefore used "discriminatory state taxes to burden commerce in other States." *Id.* at 406.

The flaw in the New York scheme thus was its reliance "on *both* a taxpayer's in-state *and* out-of-state activities in determining the taxpayer's effective tax rate." Tatarowicz & Mims-Velarde, *supra*, 39 VAND. L. REV. at 929 (emphasis added). Indeed, after referring to "job-incentive credits" and "investment-tax credits," the Court specifically "reiterate[d] that it is *not* the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, *i.e.*, the percentage of a specific segment of the corporation's business that is conducted in New York." 466 U.S. at 406 n.12 (emphasis added). "The clear implication" of this statement is that, absent an attempt to punish an increase in the taxpayer's out-of-state business, "investment tax credits and job incentive credits are *not* 'allowed on an impermissible basis' because they do not 'discriminatorily tax the products manufactured or the business operations performed in another state.'" Firestone, *supra*, 36 STATE TAX NOTES at 193 (emphasis added).

4. Ohio's ITC Is Consistent With Commerce Clause Principles

Given these holdings, the Sixth Circuit's decision "is not supported by existing case law and * * * the decision represents a significant and unwarranted expansion of the dormant Commerce Clause beyond its present scope." Firestone, *supra*, 36 STATE TAX NOTES at 189. See Biggins, *supra*, 14 J. MULTISTATE TAX'N & INCENTIVES at 37 (the Sixth Circuit's decision "is widely considered a departure from prior law"). In the Commerce Clause context, the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" (*West Lynn Creamery*, 512 U.S. at 201), with the outcome turning on "the unique characteristics of the statute

at issue and the particular circumstances in each case." *Boston Stock Exch.*, 429 U.S. at 329. The Court has made clear that this "determination as to whether a tax incentive is coercive should depend on its 'practical or economic effect' and on 'economic realities.'" Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 811 (quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1989) and *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 295 (1987)). And here, Ohio's ITC plainly is not a protectionist measure that was designed to help in-state businesses overcome out-of-state competitors; it does not penalize or otherwise impose burdens on out-of-state economic activity; and it establishes no requirements that disturb the free flow of commerce across Ohio's borders. Using the nuanced analysis of the statute's "purposes and effects" that is required by this Court's decisions, the credit accordingly does not run afoul of the Commerce Clause.

First, the credit plainly was not designed to give a competitive advantage to in-state taxpayers of the sort found problematic in *Boston Stock Exchange* and *Maryland* v. *Louisiana*. In those cases, states sought to benefit particular domestic industries by directly burdening out-of-state competitors with what amounted to protective tariffs. In contrast, Ohio confers no systematic advantage on in-state businesses, and does not in any way shield local industry from competition by out-of-state companies.

Indeed, many Ohio businesses will be unable to obtain the credit. Because the credit is available only to firms making new investments in the State that exceed the company's average investment over three baseline years, companies that confine their business to Ohio often will not qualify – but out-of-state firms making their first investment in Ohio *always* will qualify for the credit.[10] Thus, far from discouraging

[10] To qualify for a credit, any taxpayer (in-state or out-of-state) must make a new investment in Ohio. Thus, taxpayers that already engage in manufacturing in the state have no advantage over out-of-state taxpayers in obtaining the credit. As a practical matter, a business that has *no* current capital investment in Ohio can more easily qualify for the credit, because *any* initial investment it makes in the State will constitute an increase over its prior (zero) investment and thus will be eligible for a credit. By contrast, to receive a credit, a business that currently invests in a county would have to make an investment that exceeded its average investment in that county in the baseline years – and only the incremental or "excess" investment would qualify for any credit.

interstate business, the Ohio credit encourages companies to operate across state lines. Needless to say, if every state had such a system, interstate businesses would not be systematically disadvantaged. To the contrary, all companies (local and interstate) would be eligible to obtain a tax credit of equal amount wherever they did business, and interstate firms would, if anything, be at an *advantage* because the preference given to new investment in the taxing jurisdiction would make such businesses far likelier to obtain the credit than would be companies that confined their operations to one state. See Gillette, *supra*, 82 MINN. L. REV. at 448 ("competition among states for businesses may actually facilitate the objective created by the Commerce Clause of achieving economic integration for the benefit of the nation as a whole"); Firestone, *supra*, 36 STATE TAX NOTES at 194 (Ohio's ITC "encourag[es] interstate commerce by burdening a sedentary local business"). Rather than conventional protectionist legislation, the credit thus is a permissible attempt to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

Second, the credit does not vary depending upon the percentage of its total business that a company conducts in Ohio, as did the statute invalidated in *Westinghouse Electric Corp.*, but instead focuses exclusively on the taxpayer's in-state activity. As two leading commentators have described the crucial distinction in this area,

> a state tax incentive that focuses exclusively on a taxpayer's in-state activities does not have the sort of negative impact on interstate commerce with which the commerce clause is concerned. Rather, the key to finding a tax incentive unconstitutionally discriminatory appears to be a reliance by the state tax provision on both a taxpayer's in-state and out-of-state activities in determining the taxpayer's effective tax rate. Such a provision clearly has a negative impact on interstate commerce.

Tatarowicz & Mims-Velarde, *supra*, 39 VAND. L. REV. at 928-929. In contrast, "[a] tax incentive that does not penalize out-of-state activity presumably could withstand scrutiny under the commerce clause after *Westinghouse*." *Id.* at 934. And here, the Ohio credit satisfies this test. Unlike the tax credit in *Westinghouse*, the same credit is available regardless of the extent of the taxpayers' overall presence in the state, and the amount of the credit is not reduced as the taxpayer increases its investment in other states.

Third, the activity that benefits from the Ohio credit (capital investment) is not itself subject to state tax. That stands in sharp contrast to the situation in the cases where the Court invalidated tax incentives as discriminatory; in *Boston Stock Exchange* and *Maryland* v. *Lousiana*, the domestic activities that the states sought to encourage were themselves subject to tax, and the states encouraged these activities by discriminatorily relieving domestic taxpayers of a portion of the tax. See Firestone, *supra*, 36 STATE TAX NOTES at 191, 192. That approach resulted in the systematic differential taxation of particular types of interstate commerce in a manner that burdened out-of-state competitors. Here, however, the ITC is not an exemption that lowers the effective rate of taxation on a particular activity, but is instead a one-time, bottom line subtraction from a tax that Ohio was entitled to collect. That subtraction is designed to encourage conduct (capital investment) that differs from the taxed activity (the production of income within the State). As such, it is the pre-

cise equivalent of direct spending by the State on, for example, construction of roads to a new plant – spending that might substantially lower the cost of developing the facility, but that plainly would not violate the Commerce Clause. See Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 835 ("[e]conomists know that the real-world impact of such a subsidy mirrors the effect of the credit") (footnote omitted).

To be sure, the Court has drawn a distinction between subsidies for domestic commerce, which "ordinarily" are permissible (*New Energy*, 486 U.S. at 278), and tax exemptions, which in some circumstances have been held invalid. See *Camps Newfound/Owatonna*, 520 U.S. at 588-591. But the Court has indicated that "this distinction [between subsidies and tax benefits] is * * * applicable to claims that certain state action [is] *designed to give residents an advantage in the marketplace*." *Id.* at 590 (emphasis added). And in this case, where the State's credit is a one-time benefit for engaging in particular activity that is *not* designed to offer a systematic advantage to domestic businesses over out-of-state competitors, the credit's similarity to a subsidy should be decisive. "From a constitutional perspective, it is often compelling to view such one-time, targeted tax benefits as akin to direct expenditures rather than as part of the same category occupied by paradigmatic tax benefits." Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 409 (1998). Cf. *Westinghouse Elec. Corp.*, 466 U.S. at 405 (Court has "declined to attach any constitutional significance to such formal distinctions that lack economic substance").

This is not to say, of course, that all subsidies and tax exemptions must be equated for Commerce Clause purposes. Instead, our point is that a particular kind of tax credit – one that is available for engaging in one-time, non-repetitive business activity, and that does not give in-state businesses any continuing competitive advantage over out-of-state firms – is precisely equivalent to a direct subsidy. Nothing in this

Court's decisions, which repeatedly emphasize that Commerce Clause analysis must turn on "the unique characteristics of the statute at issue and the particular circumstances in each case" (*Boston Stock Exch.*, 429 U.S. at 329), suggests that this kind of functional parallel between related tax and subsidy programs is inappropriate.

5. The Decision Below Actually Discourages Interstate Business

At bottom, the controlling question here is whether the credit is a permissible attempt to encourage domestic industry rather than illegitimate protectionism. In answering that question, it is revealing that the plaintiffs here are *not* out-of-state entities who pay the challenged tax, competitors of taxpayers who obtain favorable tax treatment, or customers of entities that are handicapped by discriminatory taxes. Far from it: DaimlerChrysier's competitors vigorously *support* the constitutionality of Ohio's ITC. Instead, the plaintiffs here are, for the most part, residents of the taxing State who would like Ohio to collect *more* tax from out-of-state companies doing business in the State.

This is an exceedingly strange use of the Commerce Clause. Even critics of location tax incentives recognize that such provisions

> are quite different from the more familiar targets of Commerce Clause attacks, which, like tariffs, either protect local businesses from multistate competitors or extract tax revenues disproportionately from out-of-state businesses. Whereas the out-of-state challenger to these sorts of provisions can convincingly claim that the state unfairly excluded or penalized outsiders, such pleas are far less compelling when the challenged provision is designed to invite, even to entice, the outsiders in.

Enrich, *supra*, 110 HARV. L. REV. at 412. After all, the whole point of the Commerce Clause anti-discrimination principle

is "creating a level playing field between the taxpayer and its in-state competitors. * * * Indeed, it is this consequence of invalidating the tax incentive that provides the essential justification for judicial intervention under the dormant Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 872.

But there is no such justification in this case, where local residents have invoked the Clause to prevent their State from giving a break to an out-of-state taxpayer that is engaged in interstate commerce. Here, "competition would not be served by eliminating any tax differential * * *, and the dormant Commerce Clause has no job to do." *General Motors Corp.*, 519 U.S. at 303. Because none of the concerns that animate the Clause are implicated here, there is no basis for the Sixth Circuit's decision to strike down one of Ohio's principal tools for attracting jobs and fostering economic development. And because that decision has profoundly important national consequences, review of the decision below by this Court is warranted. The Court accordingly should grant the petitions filed by DaimlerChrysler and the State of Ohio challenging the Sixth Circuit's decision that the ITC is unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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United States Court of Appeals,
Sixth Circuit.

CHARLOTTE CUNO, ET AL.,
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER, INC., et al.,
Defendants-Appellees.

No. 01-3960.

Argued: Feb. 4, 2003.
Decided and Filed: Oct. 19, 2004.
Rehearing En Banc Denied: Jan. 18, 2005.

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

DAUGHTREY, Circuit Judge.

The plaintiffs initiated this litigation in state court, challenging the validity of certain state tax credits and local property tax abatements that were granted to DaimlerChrysler Corporation as an inducement to the company to expand its business operations in Toledo, Ohio. They contend that the tax scheme discriminates against interstate commerce by granting preferential treatment to in-state investment and activity, in violation of the Commerce Clause of the United States Constitution and the Equal Protection Clause of the Ohio Constitution. After the defendants removed the action to federal court, the district court entered an order dismissing the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for failure to state a claim. Because we conclude that the investment tax credit runs afoul of the Commerce Clause, we can affirm only part of the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1998, DaimlerChrysler entered into an agreement with the City of Toledo to construct a new vehicle-assembly plant near the company's existing facility in exchange for various tax incentives. DaimlerChrysler estimated that it would invest approximately $1.2 billion in this project, which would provide the region with several thousand new jobs. In return, the City and two local school districts agreed to give DaimlerChrysler a ten-year 100 percent property tax exemption, as well as an investment tax credit of 13.5 percent against the state corporate franchise tax for certain qualifying investments. The total value of the tax incentives was estimated to be $280 million.

Ohio's investment tax credit grants a taxpayer a nonrefundable credit against the state's corporate franchise tax if the taxpayer "purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in [Ohio]." Ohio Rev. Code Ann. § 5733.33(B)(1). The investment tax credit is generally 7.5 percent "of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county." *See* Ohio Rev. Code Ann. § 5733.33(C)(1). The rate increases to 13.5 percent of the cost of the new investment if it is purchased for use in specific economically depressed areas. *See* Ohio Rev. Code Ann. § 5733.33(C)(2), (A)(8)-(13). The credit may not exceed $1 million unless the taxpayer has increased its overall ownership of manufacturing equipment in the state during the year for which the credit is claimed. *See* Ohio Rev. Code Ann. § 5733.33(B)(2)(a). To the extent that the credit exceeds the corporation's total Ohio franchise tax liability in a particular year, the balance of the credit is carried forward

and can be used to reduce its liability in any of the three following years. *See* Ohio Rev.Code Ann. § 5733.33(D).

The personal property tax exemption is authorized under §§ 5709.62 and 5709.631; it permits municipalities to offer specified incentives to an enterprise that "agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees" in economically depressed areas. Ohio Rev. Code Ann. § 5709.62(C)(1). An exemption may be granted "for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of the assessed value of tangible personal property first used in business at the project site as a result of the agreement." Ohio Rev. Code Ann. § 5709.62(C)(1)(a). The exemption may exceed 75 percent with consent of the affected school districts. *See* Ohio Rev. Code Ann. § 5709.62(D)(1).

The district court held that the investment tax credit and the property tax exemption do not violate the Commerce Clause because, although "an increase in activity in Ohio could increase the credit and exemption amount" under the two statutes, an increase in activity *outside* the state would not decrease the amount of the tax credit or exemption and therefore would not run afoul of the United States Supreme Court's ruling in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 400-01 (1984). From that decision, the plaintiffs now appeal.

II. ANALYSIS

We review *de novo* a district court's order granting a motion to dismiss for failure to state a claim upon which relief may be granted. *See Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). In considering a motion to dismiss pursuant to Rule 12(b)(6), all well-pleaded factual allegations of the complaint must be accepted as true and the complaint construed in the light most favorable to the plaintiffs. *Id.* It is

well-settled that dismissal of a complaint is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

On appeal, the plaintiffs' primary contention is that the Ohio statutes authorizing the investment tax credit and personal property tax exemption violate the Commerce Clause of the United States Constitution. Secondarily, the plaintiffs claim that the tax incentives violate Ohio's Equal Protection Clause.

A. Commerce Clause Claim

The United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, cl. 3, and the "negative" or "dormant" aspect of the Commerce Clause implicitly limits the State's right to tax interstate commerce. A tax provision satisfies the requirements of the Commerce Clause if (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The parties do not dispute that the tax provisions at issue have a sufficient nexus with the state, are fairly apportioned, and are related to benefits provided by the state. Nor do the parties dispute that it is legitimate for Ohio to structure its tax system to encourage new intrastate economic activity. Indeed, the United States Supreme Court has indicated that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," nor does it

prevent a state from "compet[ing] with other States for a share of interstate commerce" so long as "no State [ ] discriminatorily tax[es] the products manufactured or the business operations performed in any other State." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984) (the federal Commerce Clause "limits the manner in which States may legitimately compete for interstate trade"). Rather, the parties dispute whether Ohio's method for encouraging new economic investment—conferring investment tax incentives and property tax exemptions—discriminates against interstate commerce.

The United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes. The Court has made clear, however, that a tax statute's "constitutionality does not depend upon whether one focuses upon the benefited or the burdened party." *Bacchus Imports*, 468 U.S. at 273. The fact that a statute "discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax" is therefore legally irrelevant. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404 (1984).

In general, a challenged credit or exemption will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of "a sensitive, case-by-case analysis of purposes and effects," the provision "will in its practical operation work discrimination against interstate commerce," *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994) (citations omitted), by "providing a direct commercial advantage to local business." *Bacchus Imports*, 468 U.S. at 268 (citations omitted). " '[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't. of Envtl. Quality*, 511 U.S. 93, 99 (1994). A state tax provision that discriminates against interstate commerce is

invalid unless "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

1. Investment Tax Credit

Although the investment tax credit at issue here is equally available to in-state and out-of-state businesses, the plaintiffs nevertheless maintain that it discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

The plaintiffs' argument principally relies on the Supreme Court's own explanation of its Commerce Clause jurisprudence in cases invalidating tax schemes that encourage the development of local industry by imposing greater burdens on economic activity taking place outside the state. In *Boston Stock Exchange*, for example, the Supreme Court held unconstitutional amendments to New York's securities transfer tax that aimed to offset the competitive advantage that the transfer tax otherwise created for out-of-state exchanges that did not tax transfers. *See Boston Stock Exchange*, 429 U.S. at 323-24. Prior to the amendment, New York uniformly taxed in-state transfers of securities without regard to the place of

sale. *See id.* at 322. The amendment created a 50 percent reduction in the tax rate on transfers by nonresidents and limited liability on transfers of large blocks of shares as long as the sales were made in New York. *See id.* at 324. As a result, the amendment caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales. *See id.* at 330-31. The Court held that the reduction offended the Commerce Clause's anti-discrimination principle by converting a tax that was previously "neutral as to in-state and out-of-state sales" into one that which would induce a seller to trade through a New York broker in order to reduce its tax liability. *See id.* at 330-32. In doing so, New York effectively "foreclose[d] tax-neutral decisions" and "creat[ed] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." *Id.* at 331. The diversion of interstate commerce from the most economically efficient channels that resulted from New York's use of "its power to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home state,'" *id.* at 336, (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)), was seen by the Court as "wholly inconsistent with the free trade purpose of the Commerce Clause."

Shortly thereafter, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Supreme Court reviewed a Louisiana statute that imposed a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana. *See id.* at 731. Taxpayers subject to the first-use tax were entitled to a direct tax credit on any Louisiana Severance Tax owed in connection with the extraction of natural resources within the state. *See id.* at 732. Most Louisiana consumers of offshore gas were eligible for tax credits and exemptions, but the tax applied in full to offshore gas moving through and out of state. *See id.* at 733. Noting that the state severance tax credit "fa-

vor[ed] those who both own [offshore] gas and engage in Louisiana production" and that the "obvious economic effect of this Severance Tax Credit [was] to encourage natural gas owners involved in the production of [offshore] gas to invest in mineral exploration and development within Louisiana rather than to invest in further [offshore] development or in production in other States," the Court held that the statute "unquestionably discriminate[d] against interstate commerce in favor of local interests." *Id.* at 756-57.

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), the Supreme Court invalidated a New York franchise tax that gave corporations an income tax credit based on the portion of their exports shipped from New York. Under the law, income from a subsidiary engaged exclusively in exports was to be combined with the income of its parent company for state tax purposes. *See id.* at 393. In an effort to provide an incentive to increase export activity in New York, the parent company was given a partially offsetting credit against income tax attributable to the subsidiary's income generated from New York exports. *See id.* Because the credit was based on the ratio of the subsidiary's New York exports to its income from all export shipments, a company's overall New York tax liability would decrease as exports from New York increased relative to exports from other states. Conversely, a company's New York tax liability increased when exports from New York decreased relative to exports from other states. *See id.* at 401. The Court found that the tax scheme "penalize[d] increases in the [export] shipping activities in other states," *id.* at 401, and that it was therefore a discriminatory tax that advantaged New York firms "by placing 'a discriminatory burden on commerce to its sister States.'" *Id.* at 406 (quoting *Boston Stock Exchange*, 429 U.S. at 331).

Analogizing to the provisions considered in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse*, the plaintiffs argue that the investment tax credit at issue here

encourages the development of local business through the use of Ohio's "power to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State.' " *Boston Stock Exch.*, 429 U.S. at 336 (quoting *Bruce Church*, 397 U.S. at 145). Thus, they contend that like the tax credit in *Maryland v. Louisiana*, the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states. *Cf. Boston Stock Exch.*, 429 U.S. at 336.

The defendants maintain that the Supreme Court's opinions should be read narrowly to hold that tax incentives, like the Ohio tax credit, are permissible as long as they do not penalize out-of-state economic activity, citing Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 929 (1986) (elaborating upon and applying this distinction to the Court's precedents). In their view, the Commerce Clause is primarily concerned with preventing economic protectionism—that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce. According to their theory, the only tax credits and exemptions that would run afoul of the Commerce Clause fall into two categories: those that function like a tariff by placing a higher tax upon out-of-state business or products and those that penalize out-of-state economic activity by relying on both the taxpayer's in-state and out-of-state activities to determine the taxpayer's effective tax rate.

Although it is arguably possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity. Such a distinction is tenuous in light of the Court's acknowledgment that

"[v]irtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense." *Bacchus Imports*, 468 U.S. at 273. Indeed, economically speaking, the effect of a tax benefit or burden is the same. Moreover, the Court's command to examine the practical effect of challenged tax schemes suggests that "constitutionality [should] not depend upon whether one focuses upon the benefited or the burdened party." *Id.*; *see also Westinghouse*, 466 U.S. at 404 ("Nor is it relevant that New York discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax.").

Although the defendants liken the investment tax credit to a direct subsidy, which would no doubt have the same economic effect, the Court has intimated that attempts to create location incentives through the state's power to tax are to be treated differently from direct subsidies despite their similarity in terms of end-result economic impact. The majority in New Energy noted in dicta that subsidies do not "ordinarily run afoul of [the Commerce Clause]" because they are not generally "connect[ed] with the State's regulation of interstate commerce." *New Energy Co.*, 486 U.S. at 278; *see also West Lynn Creamery*, 512 U.S. at 199 n.15 ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that '[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (quoting *New Energy Co.*, 486 U.S. at 278)). Thus, the distinction between a subsidy and a tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax.[1]

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[1] For further discussion of the constitutionality of coercive and non-coercive state regulation of interstate commerce through the state power to tax, see Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 806-09 (1996) (explaining the non-coercive nature of a similar tax exemption).

In short, while we may be sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas, we conclude that Ohio's investment tax credit cannot be upheld under the Commerce Clause of the United States Constitution.

2. Personal Property Tax Exemption

The plaintiffs maintain that the discriminatory characteristic of the City's personal property tax exemption rests not on the fact that only in-state property is eligible for exemption, but rather on the conditions that Ohio places on eligibility—conditions that require beneficiaries of the exemptions to agree to maintain a specified level of employment and investment in the state. The effect, they argue, is to subject two similarly situated owners of Ohio personal property to differential tax rates. A taxpayer who agrees to focus his employment or investment in Ohio receives preferential treatment in the form of a tax break, while a taxpayer who prefers to preserve the freedom to hire or invest elsewhere does not.

Although conditions imposed on property tax exemptions may independently violate the Commerce Clause, conditional exemptions raise no constitutional issues when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires the beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland*, 451 U.S. at 756-57 (finding unconstitutional a tax benefit that encouraged natural gas owners to invest in other forms of mineral exploration and development

within Louisiana rather than investing further in natural gas development outside the state). However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible.

Contrary to the plaintiffs' assertions, the conditions imposed on the receipt of the Ohio property tax exemption are minor collateral requirements and are directly linked to the use of the exempted personal property. The authorizing statute requires only an investment in new or existing property within an enterprise zone and maintenance of employees. *See* Ohio Rev. Code Ann. § 5709.62(C)(1). The statute does not impose specific monetary requirements, require the creation of new jobs, or encourage a beneficiary to engage in an additional form of commerce independent of the newly acquired property.[2] As a consequence, the conditions placed on eligibility for the exemption do not independently burden interstate commerce.

The cases on which the plaintiffs rely are inapplicable here, because they fail to address the question of whether conditions attached to the receipt of an exemption violate the anti-discrimination principle where the conditions themselves do not impose independent burdens upon commerce. In *Camps Newfound/Owatonna,Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Supreme Court reviewed a property tax exemption for charitable organizations that excluded organizations operated principally for the benefits of nonresidents and found the exemption unconstitutionally discriminatory because the effect of the statute was to "distinguish[ ] be-

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[2] Plaintiffs' assertion that the exemption, once received, coerces business into continual re-investment in Ohio in order to preserve the tax exemption is not persuasive. The exemption is project-specific and, therefore, a business does not lose its existing exemption by deciding to make its next investment elsewhere.

tween entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out [entities] that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business." *Id.* at 576. Similarly, the Fifth Circuit in *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997), invalidated a tax exemption because it required beneficiaries to give a preference to in-state manufacturers, suppliers, and laborers. The Ohio provision at issue contains no restriction on the individuals employed or served. Therefore, the conditional character of the Ohio property tax exemption does not resemble characteristics of property tax exemptions found unconstitutional by previous courts.

Finally, the plaintiffs' argument regarding the effect of the exemption overlooks fundamental differences between tax credits and exemptions. Unlike an investment tax credit that reduces pre-existing income tax liability, the personal property exemption does not reduce any existing property tax liability. The exemption merely allows a taxpayer to avoid tax liability for new personal property put into first use in conjunction with a qualified new investment. Thus, a taxpayer's failure to locate new investments within Ohio simply means that the taxpayer is not subject to the state's property tax at all, and any discriminatory treatment between a company that invests in Ohio and one that invests out-of-state cannot be attributed the Ohio tax regime or its failure to reduce current property taxes. *See* Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 806-09 (1996) (explaining the non-coercive nature of a similar tax exemption). Additionally, the personal property tax exemption is internally consistent because, if universally applied, the new property would escape tax liability irrespective of location. Every new investment, no matter where undertaken,

would be exempt from a tax. Thus, businesses that desire to expand are neither discriminated against nor pressured into investing in Ohio. Accordingly, we hold that the Ohio personal property tax exemption does not violate the dormant Commerce Clause.

B. State Equal Protection Claim

The plaintiffs also challenged the investment tax credit and property tax exemption under the Equal Protection Clause of the Ohio Constitution, contending that the authorizing statutes "reflect a bias in favor of entrenched local interests that results in a discriminatory allocation of tax burdens and benefits." The district court found no equal protection violation based on a determination that both provisions were rationally related to a legitimate state interest in revitalizing economically troubled areas.

The Equal Protection Clauses of the Ohio and United States Constitutions impose identical limitations on government classification. *See Am. Ass'n of Univ. Professors v. Cent. State Univ.*, 717 N.E.2d 286, 291 (Ohio 1999) (rejecting an argument that the state equal protection clause imposes stricter analysis than the federal equal protection clause). Heightened review is triggered only if the classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 600 (Ohio 1994). Because the tax credit and the exemption provision classify on the basis of locality, a classification that is not inherently suspect, the tax incentives need only satisfy rational basis review.

Under rational basis review, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cent. State Univ.*, 717 N.E.2d at 290 (quoting *FCC v. Beach Communications, Inc.*,

508 U.S. 307, 313 (1993)). A rational relationship exists so long as "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *PICA Corp., Inc. v. Tracy*, 646 N.E.2d 206, 209 (Ohio Ct. App. 1994). The state, moreover, has no duty to produce legislative facts to sustain the rationality of a statutory classification. *Cent. State Univ.*, 717 N.E.2d at 290. A statute is presumed constitutional, and the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted)).

The courts have recognized a state's legitimate interest in revitalizing economically troubled areas in order to eliminate problems frequently associated with urban blight. *See, e.g., Desenco, Inc. v. Akron*, 706 N.E.2d 323, 332 (Ohio 1999) (statutes that created economic development districts were rationally related to the state's legitimate interest in facilitating economic development, creating or preserving jobs, and improving the economic welfare of citizens); *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.") (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, (1926)). The benefits conferred by the investment tax credit and property tax exemption are rationally related to this interest, given that their objective is to encourage businesses to relocate or expand existing facilities in central cities or areas that have high unemployment rates, significant low-income populations, or deteriorating buildings.

The plaintiffs argue nonetheless that granting tax incentives to a new domestic business but not nonresident businesses is not a legitimate purpose under Ohio's Equal Protection Clause. However, the cases cited in support of this argument lend little or no weight to the plaintiffs' position. In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 880 (1985), for example, the Court invalidated an Alabama stat-

ute that imposed a higher tax rate on insurance companies that were incorporated or maintained their principal place of business outside of Alabama, on the ground that the difference in treatment failed to advance a legitimate state interest. In so ruling, the Court held "that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id.* Thus, *Metropolitan Life* holds that a state may not impose a discriminatory tax in order to promote domestic industry solely based on nonresident status. The tax benefits under the Ohio statutes, however, are equally available to domestic and foreign corporations and classify corporations on the basis of new investment in economically depressed areas.

Likewise inapplicable are the cited opinions in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). In both cases, the Supreme Court struck down a county property tax assessment scheme that could not reasonably support the state's asserted legislative purpose. In *Allegheny*, the county tax assessor valued property based on the last sale price regardless of when it was last sold, providing only a modest increase in assessed value for properties that had not been recently transferred. *See id.* at 343. This practice resulted in gross disparities in the assessed value of comparable properties. The Court acknowledged that a "[s]tate may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," but it found no rational basis for the county's tax scheme whose asserted purpose was to "assess [ ] properties at true current value." *Id.* at 343-44. Similarly, the Court held in *Hooper* that a tax exemption classifying military veterans based solely on their period of residency within the state could not be rationalized by the state's interest in encouraging veterans to relocate to the state or in repaying veterans for their military service. 472 U.S. at 620-22.

By contrast, the classification in this case is clearly supported by facts that give rise to a legitimate state interest. In the equal protection context, a tax statute withstands constitutional scrutiny as long as the burden it imposes is found to be rationally related to that purpose. The purpose of the Ohio statutes—to encourage industrial development and economic stimulation of the state's economically troubled areas—clearly has a reasonable nexus to the tax provisions. Hence, we conclude that the plaintiffs have failed to demonstrate that the challenged tax incentives violate the Equal Protection Clause of the Ohio Constitution.

III. CONCLUSION

For the reasons set out above, we REVERSE that portion of the district court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. § 5733.33, and we enjoin its enforcement. We AFFIRM the remaining portions of the district court's judgment.

United States District Court,
N.D. Ohio,
Western Division.

CHARLOTTE CUNO, ET AL.,
Plaintiffs,

v.

DAIMLERCHRYSLER, INC., ET AL.,
Defendants.

No. 3:00CV7247.

Aug. 1, 2001.

MEMORANDUM OPINION

KATZ, District Judge.

This matter is before the Court on the Defendants' motions to dismiss (Doc. Nos. 51 & 52). Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1367. For the following reasons, Defendants' motions will be granted, and the case dismissed.

BACKGROUND

The eighteen named plaintiffs in this action are challenging the legality of approximately $280,000,000 in tax benefits that were granted to Defendant DaimlerChrysler, Inc., to induce it to remain in Toledo, Ohio. On November 12, 1998, Defendants City of Toledo, Toledo Public School District, and Washington Local School District (collectively "the municipal Defendants")[1] entered into a Development Agreement

[1] Plaintiffs have also named as defendants Ohio State Treasurer Joseph T. Deters, Commissioner of the Ohio Department of Taxation Thomas M. Zaino, Director of the Department of Development of the State of Ohio C. Lee Johnson, and the State of Ohio (collectively the "State Defendants"), as well as Mayor of Toledo Carleton L. Finkbeiner.

with DaimlerChrysler whereby DaimlerChrysler received a ten-year exemption from taxes that otherwise would be levied on personal property first put into use at DaimlerChrysler's facility ("the property tax exemption"), and a credit against its state corporate franchise tax for certain qualifying investments ("the investment tax credit").

In Counts I and II of their second amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the property tax exemption, Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution. In Count III, Plaintiffs allege that even if Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631 are constitutional, DaimlerChrysler was not qualified for the property tax exemption. In Counts IV and V, Plaintiffs allege that the Ohio statutory scheme permitting the investment tax credit, Ohio Rev. Code § 5733.33, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution.

Plaintiffs originally filed their complaint in the Lucas County, Ohio, Court of Common Pleas. Defendants removed the action pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction arising out of Plaintiffs' federal constitutional challenges to the statutes at issue. On November 11, 2000, this Court denied Plaintiffs' motion to remand.

The Defendants have filed motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[2] They contend that the Plaintiffs have failed to state a claim upon which relief may be granted under the Commerce Clause of the United States Constitution, the Equal Protec-

[2] One motion to dismiss was filed by DaimlerChrysler, the other by the remaining defendants.

tion Clause of the Ohio Constitution, or Article XII, Section 2 of the Ohio Constitution. Further, they claim that the Plaintiffs have failed to satisfy the statutory prerequisites to make a claim of violation of Ohio Rev. Code § 5709.62. Finally, they argue that Joseph T. Deters, Treasurer of the State of Ohio, is not a proper party to this suit, and that the Eleventh Amendment to the United States Constitution requires the dismissal of all state law claims brought against the state defendants. The Plaintiffs have filed responses as to each issue raised by the Defendants, and the Defendants have replied. The parties' contentions are discussed below.

DISCUSSION

I. Motion to Dismiss Standard

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Westlake*, *supra*, at 858. *See generally* 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, § 12.34[1] (3d ed. 2001).

II. Dismissals by Plaintiffs' Consent

In their Memorandum in Opposition to the Defendants' Commerce Clause arguments, the Plaintiffs acknowledged that certain arguments made by the Defendants are well-founded. Accordingly, the following dismissals will be made

with the consent of the Plaintiffs and without further discussion:

1. Count III will be dismissed as to all Defendants;

2. Joseph T. Deters, Treasurer of the State of Ohio, will be dismissed as a Defendant with respect to all Counts of the Complaint;

3. The State of Ohio will be dismissed as a Defendant with respect to Counts I and IV;

4. Count II will be dismissed as to all Defendants to the extent that it rests on the claim that the property tax exemption does not fall within any of the categories enumerated in Article XII, § 2 of the Ohio Constitution.

III. Eleventh Amendment Immunity

The State Defendants argue that the sovereign immunity granted by the Eleventh Amendment to the United States Constitution requires dismissal of Counts II and V, in which the Plaintiffs allege that the tax credit and tax exemption violate the equal protection clause of the Ohio Constitution.[3] *See Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Plaintiffs object, and contend that this Court retains jurisdiction pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), or, in the alternative, that the State Defendants have waived the protections of sover-

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[3] The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

eign immunity by consenting to the removal of this case from state court.[4]

Neither of Plaintiffs' arguments are availing. *Ex Parte Young* is only available when a state official is sued in an effort to obtain injunctive relief for a violation of federal law, *see id.*, and the State Defendants have not objected to this Court's jurisdiction over any federal law claims (i.e. those in which the Plaintiffs allege that the tax credit and tax exemption violate the Commerce Clause). *Ex Parte Young* is not available where a State or state official asserts immunity to suit based on a state law (*i.e.*, the Plaintiffs' claims of violation of the equal protection clause of the Ohio Constitution).

The State Defendants have not waived their immunity through consent to removal. Sovereign immunity may be waived with state consent. *See Mixon v. Ohio*, 193 F.3d 389, 397 (6th Cir. 1999) (citing *Alden*, 527 U.S. 706, and *Seminole Tribe*, 517 U.S. 44). In *Mixon*, the Sixth Circuit stated, "Ohio has not waived its sovereign immunity in federal court." *Mixon*, 193 F.3d at 397. Furthermore, "Ohio *only* allows a waiver of sovereign immunity by its legislature or its courts." *Id.* at 397 n.7 (citing *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 460 (6th Cir. 1982)) (emphasis added). Neither the legislature nor the courts of Ohio have made such a waiver in this case.

[4] The state defendants suggest that, as an alternative to deciding the immunity question, this Court first proceed to the ultimate issue and then only return to immunity if the motion to dismiss would otherwise be denied. *See Parella v. Retirement Board of Rhode Island Employees' Ret. Sys.*, 173 F.3d 46 (1st Cir. 1999) (Eleventh Amendment not strictly jurisdictional and therefore may be bypassed for resolution of more simple legal issue). It appears that the Sixth Circuit has rejected this approach. *See Mixon v. Ohio*, 193 F.3d 389, 397 n.6 (6th Cir. 1999) ("[W]e must address the [Eleventh Amendment] immunity issue because it is jurisdictional."), *citing Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996) ("[N]either the litigants' consent, nor oversight, nor convenience can justify a court's exercise of illegal power.").

The Plaintiffs contend that waiver was effected through consent to removal. To support this proposition, they point to Justice Kennedy's concurrence in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998) (Kennedy, J., concurring), in which the Justice cast doubt upon the propriety of allowing a state to raise the issue of Eleventh Amendment immunity following consent to removal. Absent an otherwise divided Court, the concurring opinion of a single Justice bears only persuasive weight. Without further guidance from either the Sixth Circuit or the Supreme Court, this Court must hold that consent to removal, without more, does not act as a waiver of the sovereign immunity provided by the Eleventh Amendment. *See also Gwinn Area Comty. Sch. v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984) (consent to removal by state attorneys not a waiver absent legislative direction).

Because this case came before this Court through removal, it remains to be decided whether the claims for which the State Defendants have asserted immunity should be remanded to state court or dismissed without prejudice. The Sixth Circuit has held, "[T]he proper course is to direct the district court to remand these claims to the state court." *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 338 (6th Cir. 1990). The Defendants argue that the *Metropolitan Sewer* holding was cast into doubt by *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). That argument is well-taken. In *Schacht*, the District Court for the Western District of Wisconsin dismissed the plaintiff's claims over which it lacked jurisdiction due to the state's assertion of the Eleventh Amendment. *See id.* at 385. On appeal, the Seventh Circuit vacated the judgment of the District Court; the judgment of the Seventh Circuit was vacated in turn by the Su-

preme Court. *See id.* at 393. Although the matter was not specifically addressed by the Court, it would appear that dismissal of the barred claims without prejudice was therefore the appropriate course. Since the Sixth Circuit has not reconsidered the issue of dismissal or remand in light of *Schacht*, this Court will dismiss without prejudice Counts II and V inasmuch as they are brought against the State Defendants.

IV. Equal Protection Clause of the Ohio Constitution

Although Counts II and V will be dismissed without prejudice with respect to the State Defendants, whether either or both Counts state a claim upon which relief may be granted must still be decided with respect to the remaining Defendants. As noted in Section III, *supra*, in Counts II and V the Plaintiffs allege that the property tax exemption and the investment tax credit violate the equal protection clause of the Ohio Constitution.[5] They claim that the exemption and credit "compel[ ] a conclusion of corporate favoritism." (Pl. Mem. Opp. Eq. Prot. at 15).

Both parties acknowledge that the Ohio and United States equal protection clauses impose identical limits on governmental classification. *See Kinney v. Kaiser Aluminum & Chem. Corp.*, 322 N.E.2d 880, 882 (Ohio 1975). The parties further agree that to withstand scrutiny a classification is only required to "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). It is the burden of the Plaintiffs in this case to "negative every conceivable basis

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[5] Article I, section 2 of the Ohio Constitution states, "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." Ohio Const. Art. I, § 2 (West 2001).

which might support" the challenged classification. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (quotation and citation omitted).

Review of both the exemption and the credit makes abundantly clear that the purpose of their enactment was to encourage industrial investment and development in Ohio, particularly in economically troubled areas.[6] This constitutes a legitimate state interest that clearly has a rational nexus to the exemption and the credit. *See, e.g., Nordlinger*, 505 U.S. at 12; *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959) ("[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."). Even if that was not the intent of the legislature and the parties when the laws were enacted and the Development Agreement entered into, that such a reason is able to be articulated is enough. *See Nordlinger*, 505 U.S. at 28 (Thomas, J., concurring in part and concurring in judgment) ("Unless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction."). Although the Plaintiffs have submitted examples of a number of cases in which various tax measures were struck down as in violation of equal pro-

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[6] As pointed out by the Defendants, the Development Agreement states that the tax exemption is "in the vital and best interests of the City and the health, safety, morals, and welfare of its residents, and necessary for the purposes of carrying out the Stickney Urban Renewal Plan, elimination of blight and recurrence of blight and for the creation and preservation of jobs and employment opportunities; and to improve the economic welfare of the people of the City."

tection, none are on point with the current case. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster Cty., West Virginia*, 488 U.S. 336 (1989) (appraisal values may not be entirely arbitrary); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (tax may not be applied differently to domestic and foreign corporations where both are subject to tax); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985) (classification invalid when sole purpose was to favor long-term residents); *Bush v. Gore*, 531 U.S. 98 (2000) (suffrage case almost entirely unrelated to the instant case).

The Plaintiffs have failed to demonstrate that either the exemption or the credit violate the equal protection clause of the Ohio Constitution. Counts II and V will be dismissed.

V. Commerce Clause of the United States Constitution

In Counts I and IV, the Plaintiffs claim that the property tax exemption, authorized by Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631, and the investment tax credit, authorized by Ohio Rev. Code § 5733.33, are unconstitutional because they violate the Commerce Clause of the United States Constitution. In addition to giving Congress the power "to regulate commerce . . . among the several States," U.S. Const., art. I, § 8, cl. 3, the Commerce Clause was crafted to "prohibit[ ] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (internal quotations and citations omitted).

To determine if a state tax violates the Commerce Clause, courts apply a four-part test. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A state tax violates the Commerce Clause if:

1. it lacks a "sufficient nexus with the State;"

2. it "discriminates against interstate commerce;"
3. it "is unfairly apportioned;" or
4. "it is unrelated to services provided by the State."

See id. at 277-78.

In the instant case, the parties do not appear to dispute that the exemption and credit at issue satisfy the "sufficient nexus," fairly apportioned, and service-related prongs of the *Complete Auto* test. The Plaintiffs do contend, however, that the exemption and credit run afoul of the Commerce Clause through discrimination against interstate commerce. This argument is without merit.

It is well-established that states are not precluded from enacting taxation schemes for the benefit of intrastate commerce and industry:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 336-37 (1977); *see also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385 (1991) ("[It is] a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State."); *West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15 (1994) ("[I]t is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."); *Hughes v. Alexandria Scrap Corp.*, 426

U.S. 794, 816 (1976) (Stevens, J., concurring) (suggesting that local industry may be encouraged through "cash subsidy, a tax credit, or a special privilege intended to attract investment capital"); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) (discussing possibility of "providing subsidies or other tax breaks to domestic industries").

As pointed out by the Defendants, there are two categories of taxation schemes that have been rejected by the Supreme Court. The first and most obvious is a system that acts as a "protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc.*, 512 U.S. at 193. Clearly, the property tax exemption at issue is not a tariff, since it applies only to property owned in the State of Ohio. If a potential taxpayer is unhappy with the effect of the exemption, it is free to relocate to another state and conduct all the business that it wishes without further consequence. Similarly, the investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce. Instead, it is available equally to businesses regardless of their initial location, so long as they increase the amount of their Ohio investment.

The second inappropriate scheme involves discriminatory taxation based on proportion of a business's activity that is carried on within a state as compared to business done in other states. The paradigmatic example of this type of scheme is the New York law found unconstitutional in *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984). In *Westinghouse*, the Supreme Court addressed a New York law that taxed corporate income but returned a portion of that tax as a credit based on the proportion of total business activity conducted in New York. *Id.* at 393-94. This is similar to the credit and exemption schemes currently at issue here, since an increase in activity in Ohio could increase the credit and

exemption amount; however, the *Westinghouse* credit had one crucial difference: an increase in activity conducted outside New York would decrease the amount of the credit. *See id.* at 400-01. Such is obviously not the case here, where neither the credit nor the exemption varies with increased activity outside Ohio.

Notwithstanding Plaintiff's innovative arguments to the contrary, the property tax exemption and investment tax credit at issue here do not "discriminate against interstate commerce" in either of the well-established ways that would lead to invalidation under the Commerce Clause. Finding either scheme unconstitutional would therefore require this Court to violate the clear mandate of Supreme Court precedent, which is something, of course, that this Court will not do. Accordingly, Counts I and IV will be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss (Doc. Nos. 51 & 52) will be granted, and the case dismissed.

IT IS SO ORDERED.

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' motions to dismiss (Doc. Nos. 51 & 52) are Granted;

FURTHER ORDERED that Counts II and V of the Complaint are Dismissed without prejudice as to Defendants Commissioner of the Ohio Department of Taxation Thomas M. Zaino, Director of the Department of Development of the State of Ohio C. Lee Johnson, and the State of Ohio;

FURTHER ORDERED that Counts II and V of the Complaint are Dismissed with prejudice with respect to Defendants Ohio State Treasurer Joseph T. Deters, Mayor of Toledo Carleton L. Finkbeiner, the City of Toledo, Toledo Public School District, Washington Local School District, and DaimlerChrysler, Inc.;

FURTHER ORDERED that Counts, I, III, and IV of the Complaint are dismissed with prejudice as to all Defendants.

No. 01-3960

United States Court of Appeals
For The Sixth Circuit

CHARLOTTE CUNO, ET AL.,
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER, INC., ET AL.,
Defendants-Appellees.

Filed: Jan. 18, 2005.

ORDER

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

The court having received three (3) petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, CLERK

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* Judge Sutton recused himself from participation in this ruling.

Ohio Revised Code § 5733.33. Credit for purchase of new manufacturing machinery and equipment

(A) As used in this section:

(1) "Manufacturing machinery and equipment" means engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing. "Manufacturing machinery and equipment" does not include property acquired after December 31, 1999, that is used:

(a) For the transmission and distribution of electricity;

(b) For the generation of electricity, if fifty per cent or more of the electricity that the property generates is consumed, during the one-hundred-twenty-month period commencing with the date the property is placed in service, by persons that are not related members to the person who generates the electricity.

(2) "New manufacturing machinery and equipment" means manufacturing machinery and equipment, the original use in this state of which commences with the taxpayer or with a partnership of which the taxpayer is a partner. "New manufacturing machinery and equipment" does not include property acquired after December 31, 1999, that is used:

(a) For the transmission and distribution of electricity;

(b) For the generation of electricity, if fifty per cent or more of the electricity that the property generates is consumed, during the one-hundred-twenty-month period commencing with the date the property is placed in service, by persons that are not related members to the person who generates the electricity.

(3)(a) "Purchase" has the same meaning as in section 179(d)(2) of the Internal Revenue Code.

(b) For purposes of this section, any property that is not manufactured or assembled primarily by the taxpayer is considered purchased at the time the agreement to acquire the property becomes binding. Any property that is manufactured or assembled primarily by the taxpayer is considered purchased at the time the taxpayer places the property in service in the county for which the taxpayer will calculate the county excess amount.

(c) Notwithstanding section 179(d) of the Internal Revenue Code, a taxpayer's direct or indirect acquisition of new manufacturing machinery and equipment is not purchased on or after July 1, 1995, if the taxpayer, or a person whose relationship to the taxpayer is described in subparagraphs (A), (B), or (C) of section 179(d)(2) of the Internal Revenue Code, had directly or indirectly entered into a binding agreement to acquire the property at any time prior to July 1, 1995.

(4) "Qualifying period" means the period that begins July 1, 1995, and ends December 31, 2015.

(5) "County average new manufacturing machinery and equipment investment" means either of the following:

(a) The average annual cost of new manufacturing machinery and equipment purchased for use in the county during baseline years, in the case of a taxpayer that was in existence for more than one year during baseline years.

(b) Zero, in the case of a taxpayer that was not in existence for more than one year during baseline years.

(6) "Partnership" includes a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not

classified for federal income tax purposes as an association taxable as a corporation.

(7) "Partner" includes a member of a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not classified for federal income tax purposes as an association taxable as a corporation.

(8) "Distressed area" means either a municipal corporation that has a population of at least fifty thousand or a county that meets two of the following criteria of economic distress, or a municipal corporation the majority of the population of which is situated in such a county:

(a) Its average rate of unemployment, during the most recent five-year period for which data are available, is equal to at least one hundred twenty-five per cent of the average rate of unemployment for the United States for the same period;

(b) It has a per capita income equal to or below eighty per cent of the median county per capita income of the United States as determined by the most recently available figures from the United States census bureau;

(c)(i) In the case of a municipal corporation, at least twenty per cent of the residents have a total income for the most recent census year that is below the official poverty line;

(ii) In the case of a county, in intercensal years, the county has a ratio of transfer payment income to total county income equal to or greater than twenty-five per cent.

(9) "Eligible area" means a distressed area, a labor surplus area, an inner city area, or a situational distress area.

(10) "Inner city area" means, in a municipal corporation that has a population of at least one hundred thousand and does not meet the criteria of a labor surplus area or a distressed area, targeted investment areas established by the municipal corporation within its boundaries that are comprised of the most recent census block tracts that individually have at least twenty per cent of their population at or below the state poverty level or other census block tracts contiguous to such census block tracts.

(11) "Labor surplus area" means an area designated as a labor surplus area by the United States department of labor.

(12) "Official poverty line" has the same meaning as in division (A) of section 3923.51 of the Revised Code.

(13) "Situational distress area" means a county or a municipal corporation that has experienced or is experiencing a closing or downsizing of a major employer, that will adversely affect the county's or municipal corporation's economy. In order to be designated as a situational distress area for a period not to exceed thirty-six months, the county or municipal corporation may petition the director of development. The petition shall include written documentation that demonstrates all of the following adverse effects on the local economy:

(a) The number of jobs lost by the closing or downsizing;

(b) The impact that the job loss has on the county's or municipal corporation's unemployment rate as measured by the state director of job and family services;

(c) The annual payroll associated with the job loss;

(d) The amount of state and local taxes associated with the job loss;

(e) The impact that the closing or downsizing has on the suppliers located in the county or municipal corporation.

(14) "Cost" has the same meaning and limitation as in section 179(d)(3) of the Internal Revenue Code.

(15) "Baseline years" means:

(a) Calendar years 1992, 1993, and 1994, with regard to a credit claimed for the purchase during calendar year 1995, 1996, 1997, or 1998 of new manufacturing machinery and equipment;

(b) Calendar years 1993, 1994, and 1995, with regard to a credit claimed for the purchase during calendar year 1999 of new manufacturing machinery and equipment;

(c) Calendar years 1994, 1995, and 1996, with regard to a credit claimed for the purchase during calendar year 2000 of new manufacturing machinery and equipment;

(d) Calendar years 1995, 1996, and 1997, with regard to a credit claimed for the purchase during calendar year 2001 of new manufacturing machinery and equipment;

(e) Calendar years 1996, 1997, and 1998, with regard to a credit claimed for the purchase during calendar year 2002 of new manufacturing machinery and equipment;

(f) Calendar years 1997, 1998, and 1999, with regard to a credit claimed for the purchase during calendar year 2003 of new manufacturing machinery and equipment;

(g) Calendar years 1998, 1999, and 2000, with regard to a credit claimed for the purchase during calendar year 2004 of new manufacturing machinery and equipment;

(h) Calendar years 1999, 2000, and 2001, with regard to a credit claimed for the purchase during calendar year 2005 of new manufacturing machinery and equipment;

(i) Calendar years 2000, 2001, and 2002, with regard to a credit claimed for the purchase during calendar year 2006 of new manufacturing machinery and equipment;

(j) Calendar years 2001, 2002, and 2003, with regard to a credit claimed for the purchase during calendar year 2007 of new manufacturing machinery and equipment;

(k) Calendar years 2002, 2003, and 2004, with regard to a credit claimed for the purchase during calendar year 2008 of new manufacturing machinery and equipment;

(l) Calendar years 2003, 2004, and 2005, with regard to a credit claimed for the purchase during calendar year 2009 of new manufacturing machinery and equipment;

(m) Calendar years 2004, 2005, and 2006, with regard to a credit claimed for the purchase during calendar year 2010 of new manufacturing machinery and equipment;

(n) Calendar years 2005, 2006, and 2007, with regard to a credit claimed for the purchase during calendar year 2011 of new manufacturing machinery and equipment;

(o) Calendar years 2006, 2007, and 2008, with regard to a credit claimed for the purchase during calendar year 2012 of new manufacturing machinery and equipment;

(p) Calendar years 2007, 2008, and 2009, with regard to a credit claimed for the purchase during calendar year 2013 of new manufacturing machinery and equipment;

(q) Calendar years 2008, 2009, and 2010, with regard to a credit claimed for the purchase during calendar year 2014 of new manufacturing machinery and equipment;

(r) Calendar years 2009, 2010, and 2011, with regard to a credit claimed for the purchase during calendar year 2015 of new manufacturing machinery and equipment.

(16) "Related member" has the same meaning as in section 5733.042 of the Revised Code.

(B)(1) Subject to division (I) of this section, a nonrefundable credit is allowed against the tax imposed by section 5733.06

of the Revised Code for a taxpayer that purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in this state no later than December 31, 2016.

(2)(a) Except as otherwise provided in division (B)(2)(b) of this section, a credit may be claimed under this section in excess of one million dollars only if the cost of all manufacturing machinery and equipment owned in this state by the taxpayer claiming the credit on the last day of the calendar year exceeds the cost of all manufacturing machinery and equipment owned in this state by the taxpayer on the first day of that calendar year.

As used in division (B)(2)(a) of this section, "calendar year" means the calendar year in which the machinery and equipment for which the credit is claimed was purchased.

(b) Division (B)(2)(a) of this section does not apply if the taxpayer claiming the credit applies for and is issued a waiver of the requirement of that division. A taxpayer may apply to the director of development for such a waiver in the manner prescribed by the director, and the director may issue such a waiver if the director determines that granting the credit is necessary to increase or retain employees in this state, and that the credit has not caused relocation of manufacturing machinery and equipment among counties within this state for the primary purpose of qualifying for the credit.

(C)(1) Except as otherwise provided in division (C)(2) and division (I) of this section, the credit amount is equal to seven and one-half per cent of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county.

(2) Subject to division (I) of this section, as used in division (C)(2) of this section "county excess" means the taxpayer's excess cost for a county as computed under division (C)(1) of this section.

Subject to division (I) of this section, a taxpayer with a county excess, whose purchases included purchases for use in any eligible area in the county, the credit amount is equal to thirteen and one-half per cent of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in the eligible areas in the county, provided that the cost subject to the thirteen and one-half per cent rate shall not exceed the county excess. If the county excess is greater than the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in eligible areas in the county, the credit amount also shall include an amount equal to seven and one-half per cent of the amount of the difference.

(3) If a taxpayer is allowed a credit for purchases of new manufacturing machinery and equipment in more than one county or eligible area, it shall aggregate the amount of those credits each year.

(4) The taxpayer shall claim one-seventh of the credit amount for the tax year immediately following the calendar year in which the new manufacturing machinery and equipment is purchased for use in the county by the taxpayer or partnership. One-seventh of the taxpayer credit amount is allowed for each of the six ensuing tax years. Except for carried-forward amounts, the taxpayer is not allowed any credit amount remaining if the new manufacturing machinery and equipment is sold by the taxpayer or partnership or is transferred by the taxpayer or partnership out of the county before the end of the seven-year period unless, at the time of the sale or transfer, the new manufacturing machinery and equipment has been fully depreciated for federal income tax purposes.

(5)(a) A taxpayer that acquires manufacturing machinery and equipment as a result of a merger with the taxpayer with whom commenced the original use in this state of the manufacturing machinery and equipment, or with a taxpayer that was a partner in a partnership with whom commenced the original use in this state of the manufacturing machinery and equipment, is entitled to any remaining or carried-forward credit amounts to which the taxpayer was entitled.

(b) A taxpayer that enters into an agreement under division (C)(3) of section 5709.62 of the Revised Code and that acquires manufacturing machinery or equipment as a result of purchasing a large manufacturing facility, as defined in section 5709.61 of the Revised Code, from another taxpayer with whom commenced the original use in this state of the manufacturing machinery or equipment, and that operates the large manufacturing facility so purchased, is entitled to any remaining or carried-forward credit amounts to which the other taxpayer who sold the facility would have been entitled under this section had the other taxpayer not sold the manufacturing facility or equipment.

(c) New manufacturing machinery and equipment is not considered sold if a pass-through entity transfers to another pass-through entity substantially all of its assets as part of a plan of reorganization under which substantially all gain and loss is not recognized by the pass-through entity that is transferring the new manufacturing machinery and equipment to the transferee and under which the transferee's basis in the new manufacturing machinery and equipment is determined, in whole or in part, by reference to the basis of the pass-through entity which transferred the new manufacturing machinery and equipment to the transferee.

(d) Division (C)(5) of this section shall apply only if the acquiring taxpayer or transferee does not sell the new manufacturing machinery and equipment or transfer the new manufacturing machinery and equipment out of the county

before the end of the seven-year period to which division (C)(4) of this section refers.

(e) Division (C)(5)(b) of this section applies only to the extent that the taxpayer that sold the manufacturing machinery or equipment, upon request, timely provides to the tax commissioner any information that the tax commissioner considers to be necessary to ascertain any remaining or carried-forward amounts to which the taxpayer that sold the facility would have been entitled under this section had the taxpayer not sold the manufacturing machinery or equipment. Nothing in division (C)(5)(b) or (e) of this section shall be construed to allow a taxpayer to claim any credit amount with respect to the acquired manufacturing machinery or equipment that is greater than the amount that would have been available to the other taxpayer that sold the manufacturing machinery or equipment had the other taxpayer not sold the manufacturing machinery or equipment.

(D) The taxpayer shall claim the credit in the order required under section 5733.98 of the Revised Code. Each year, any credit amount in excess of the tax due under section 5733.06 of the Revised Code after allowing for any other credits that precede the credit under this section in that order may be carried forward for three tax years.

(E) A taxpayer purchasing new manufacturing machinery and equipment and intending to claim the credit shall file, with the department of development, a notice of intent to claim the credit on a form prescribed by the department of development. The department of development shall inform the tax commissioner of the notice of intent to claim the credit.

(F) The director of development shall annually certify, by the first day of January of each year during the qualifying period, the eligible areas for the tax credit for the calendar

year that includes that first day of January. The director shall send a copy of the certification to the tax commissioner.

(G) New manufacturing machinery and equipment for which a taxpayer claims the credit under section 5733.31, 5733.311, 5747.26, or 5747.261 of the Revised Code shall not be considered new manufacturing machinery and equipment for purposes of the credit under this section.

(H)(1) Notwithstanding sections 5733.11 and 5747.13 of the Revised Code, but subject to division (H)(2) of this section, the tax commissioner may issue an assessment against a person with respect to a credit claimed under this section for new manufacturing machinery and equipment described in division (A)(1)(b) or (2)(b) of this section, if the machinery or equipment subsequently does not qualify for the credit.

(2) Division (H)(1) of this section shall not apply after the twenty-fourth month following the last day of the period described in divisions (A)(1)(b) and (2)(b) of this section.

(I) Notwithstanding any other provision of this section to the contrary, in the case of a qualifying controlled group, the credit available under this section to a taxpayer or taxpayers in the qualifying controlled group shall be computed as if all corporations in the group were a single corporation. The credit shall be allocated to such a taxpayer or taxpayers in the group in any amount elected for the taxable year by the group. Such election shall be revocable and amendable during the period described in division (B) of section 5733.12 of the Revised Code.

This division applies to all purchases of new manufacturing machinery and equipment made on or after January 1, 2001, and to all baseline years used to compute any credit attributable to such purchases; provided, that this division may be applied solely at the election of the qualifying controlled group with respect to all purchases of new manufacturing machinery and equipment made before that date, and

to all baseline years used to compute any credit attributable to such purchases. The qualifying controlled group at any time may elect to apply this division to purchases made prior to January 1, 2001, subject to the following:

(1) The election is irrevocable;

(2) The election need not accompany a timely filed report, but the election may accompany a subsequently filed but timely application for refund, a subsequently filed but timely amended report, or a subsequently filed but timely petition for reassessment.